

1 such policies were mere shams upon which it had never intended to perform and that, in fact,
2 thereby defrauding the court and, by this means, and otherwise, preventing plaintiff from
3 presenting his case.

4 UNUM hid from the court, and from plaintiff, the fact of it's schemes, thereby depriving
5 the court of the opportunity to consider the case fairly and denying plaintiff of the opportunity to
6 present his case to the court at all.

7 Plaintiff could not assert his cause of action for violation of RICO or Unfair Business
8 Practices because defendants hid the facts giving rise to the action from himself, from the court and
9 from the public at large. In fact, it required the entire apparatus of the California Department of
10 Insurance, the Attorney General of the State of New York, and of many other states, to bring this
11 ten billion dollar a year company to heel.

12 Plaintiff was prevented from presenting his claims in court because, despite his diligent
13 attempts to discover every fact underlying his claims (See Complaint, ¶¶ 23-24), these present
14 defendants concealed from plaintiff and from this court the fact of their illegal scheme to
15 intentionally deprive plaintiff, and other policy holders, of their rightful benefits.

16 The court should allow plaintiff to conduct discovery to allow plaintiff the opportunity to
17 perform discovery and otherwise develop evidence which he believes exists but which is now in
18 the sole possession and control of the defendants showing fraud adequate to overcome the Res
19 Judicata bar.

20 Further, defendants assertions, in their moving papers, regarding the reasons that the
21 courts who heard plaintiff's initial cases against UNUM dismissed those claims, are moot because
22 those courts were making decisions, as was plaintiff, based on partial and doctored information and
23 incorrectly believing that these defendants were litigating in good faith.

24 Defendants' Motion to Dismiss based on Res Judicata should be denied because the
25 judgments relied upon were obtained by fraud.

26 B. There Is a Strong Public Policy Argument to Deny Defendants' Motion Based on Res
27 Judicata

28 The law insists on an exception to the Res Judicata defense where there are strong public
policy considerations for allowing the case to go forward.

1 We have also recognized that public policy considerations may warrant
 2 an exception to the claim preclusion aspect of res judicata, at least
 3 where the issue is a question of law rather than of fact.

4 (*Jenkins v. County of Riverside*, 138 Cal.App.4th 593(2006))

5 Here, of course, there is a question of law involved because of the Insurance
 6 Commissioner's findings, subsequent to the entry of any judgment against plaintiff, that UNUM
 7 repeatedly violated Insurance Code Sections 700 and 704. The question before the court thus
 8 becomes, in part, one of the effect of the concealed violations of statute by UNUM on the lower
 9 court's process and judgment.

10 In rare cases a judgment may not be res judicata and there are rare instances in
 11 which [res judicata] is not applied. In such cases it will not be applied so rigidly
 12 as to defeat the ends of justice or important considerations of policy.

13 (*Robert J. v. Leslie M.* 51 Cal.App.4th 1642,(1997))

14 In the instant case, the Complaint adequately alleges a consortium of defendants,
 15 comprising the largest disability insurers in America, running their companies as a criminal
 16 enterprise. Strangely, defendants do not welcome the opportunity to defeat these allegations on the
 17 merits. This is because the allegations are true and these defendants know them to be true. Rather
 18 defendants seek to rely on improperly obtained former judgments to bar the action. T

19 This court should not allow such. There is a strong public policy in California, enshrined
 20 in statute, requiring that insurers doing business in this state be licensed (certified) by the state.
 21 (*California Insurance Code 700 et seq.*) The Insurance Commissioner has found that these present
 22 defendants have violated that law. (See Complaint ¶ 29.) Moreover, the Complaint alleges that
 23 these defendants so structured, organized and did maintain their respective businesses that
 24 defendants UNUM were not legitimate insurance companies at all, but were, rather, a racket a
 25 corrupt sham company, an enterprise organized for the purpose of collecting premiums but not
 26 paying valid claims. (See Complaint ¶ 41.)

27 The truth or falsity of these allegations is a matter of significant public interest because,
 28 despite promises to the contrary, UNUM has not changed its claims handling practices since
 29 entering into settlement with either California or New York, witness the letter from Attorney
 30 Bourhis, who assisted both The California Insurance Commissioner and The New York Attorney
 31 General in their respective investigations of UNUM. (SSDec EXHIBIT "H").

1 The people and businesses of this state both need and deserve a reliable, properly
 2 functioning, insurance industry. In 18 USC 1961, *et seq.*, the Congress has given the people and
 3 the courts a vehicle for safeguarding this interest. Companies like UNUM which flout their
 4 promises, and the law, are a real threat to the safety and welfare of the citizenry and of the efficient
 5 function of commerce. This court should recognize the importance to the public of the opportunity
 6 to enforce such legislation and allow the case to move forward for reasons of public policy.

7 Defendants Motion to Dismiss should be denied because it is contrary to public policy.

8 C. Res Judicata Does Not Apply Because Plaintiff Seeks Vindication of Different Rights

9 Finally, plaintiff asserts that the doctrine of Res Judicata does not apply because the relief
 10 sought in the present action is based on different rights than the relief sought in any previous
 11 action.

12 As noted above, in addition to identity, or privity, of parties, the doctrine of Res Judicata
 13 requires the presence of three elements:

14 (1) was the previous adjudication on the merits,

15 (2) was it final, and

16 (3) does the current dispute involve the same 'claim' or 'cause of action'?

17 (*Robi v. Five Platters, (supra) op cit.*

18 In the instant case, defendants can not show that plaintiff seeks to vindicate the "same
 19 claim or cause of action." The criteria by which identity of a claim or cause of action is to be
 20 judged in California is well established:

21 California has consistently applied the 'primary rights' theory, under which the
 22 invasion of one primary right gives rise to a single cause of action. As we recently
 23 observed, California's 'primary rights' theory does not mean that different causes of
 action are involved just because relief may be obtained under ... either of two legal
 theories."

24 *Robi, (supra)* at 324 (citations and quotation marks omitted).

25 As shown in the Complaint and First Amended Complaint on attached, as Exhibits 1 and
 26 3, respectively, to the Declaration of John Burnite in support of Defendants' Motion to Dismiss,
 27 the primary right plaintiff sought to vindicate in his previous suits against UNUM were rights
 28 available to an individual employee, under ERISA, for breach of contract. According to the First
 Amended Complaint (See EXHIBIT "3" to the Declaration of John Burnite), plaintiff sought to

1 vindicate such rights exclusively under the *Employee Retirement Income Security Act, ERISA*,
 2 codified at 29 USC §1144 et seq.

3 In passing *ERISA*, congress made specific findings and offered specific declaration of
 4 policy, to wit: at Title 29 USC Chapter 18, Subtitle A. General Provisions

5 § 1001. Congressional findings and declaration of policy

6 (a) Benefit plans as affecting interstate commerce and the Federal taxing power

7 The Congress finds that the growth in size, scope, and numbers of employee
 8 benefit plans in recent years has been rapid and substantial; that the operational
 9 scope and economic impact of such plans is increasingly interstate; that the
 10 continued well-being and security of millions of employees and their dependents
 11 are directly affected by these plans; that they are affected with a national public
 12 interest; that they have become an important factor affecting the stability of
 13 employment and the successful development of industrial relations; that they
 14 have become an important factor in commerce because of the interstate character
 15 of their activities, and of the activities of their participants, and the employers,
 16 employee organizations, and other entities by which they are established or
 17 maintained; that a large volume of the activities of such plans are carried on by
 18 means of the mails and instrumentalities of interstate commerce; that owing to
 19 the lack of employee information and adequate safeguards concerning their
 20 operation, it is desirable in the interests of employees and their beneficiaries, and
 21 to provide for the general welfare and the free flow of commerce, that disclosure
 be made and safeguards be provided with respect to the establishment, operation,
 and administration of such plans; that they substantially affect the revenues of
 the United States because they are afforded preferential Federal tax treatment;
 that despite the enormous growth in such plans many employees with long years
 of employment are losing anticipated retirement benefits owing to the lack of
 vesting provisions in such plans; that owing to the inadequacy of current
 minimum standards, the soundness and stability of plans with respect to adequate
 funds to pay promised benefits may be endangered; that owing to the termination
 of plans before requisite funds have been accumulated, employees and their
 beneficiaries have been deprived of anticipated benefits; and that it is therefore
 desirable in the interests of employees and their beneficiaries, for the protection
 of the revenue of the United States, and to provide for the free flow of
 commerce, that minimum standards be provided assuring the equitable character
 of such plans and their financial soundness.

22 (b) Protection of interstate commerce and beneficiaries by requiring disclosure
 23 and reporting, setting standards of conduct, etc., for fiduciaries

24 It is hereby declared to be the policy of this chapter to protect interstate
 25 commerce and the interests of participants in employee benefit plans and their
 26 beneficiaries, by requiring the disclosure and reporting to participants and
 27 beneficiaries of financial and other information with respect thereto, by
 establishing standards of conduct, responsibility, and obligation for fiduciaries of
 employee benefit plans, and by providing for appropriate remedies, sanctions,
 and ready access to the Federal courts.

28 (c) Protection of interstate commerce, the Federal taxing power, and
 beneficiaries by vesting of accrued benefits, setting minimum standards of
 funding, requiring termination insurance

1 It is hereby further declared to be the policy of this chapter to protect interstate
 2 commerce, the Federal taxing power, and the interests of participants in private
 3 pension plans and their beneficiaries by improving the equitable character and
 4 the soundness of such plans by requiring them to vest the accrued benefits of
 5 employees with significant periods of service, to meet minimum standards of
 6 funding, and by requiring plan termination insurance.

7 In this code section, Congress has codified the rights that a person may vindicate under
 8 *ERISA*. These include:

9 The protection of his own and his beneficiaries anticipated benefits, (Sub section
 10 (a));

11 The protection of interstate commerce and the interests of participants in
 12 employee benefit plans and their beneficiaries (Sub section (b));

13 The protection of the Federal taxing power, and the interests of participants in
 14 private pension plans and their beneficiaries by improving the equitable character
 15 and the soundness of such plans (Sub section (c)).

16 Accordingly, these rights, the rights afforded under *ERISA* are the rights that plaintiff
 17 sought to vindicate in his previous lawsuits against UNUM.

18 In the instant case the rights that plaintiff seeks to vindicate are completely different and
 19 may be characterized as the right of a citizen to conduct his business in the knowledge that his
 20 government is not intentionally providing certification to businesses that are, as a matter of public
 21 record, being conducted as criminal enterprises. The Mafia may exist but it is not sanctioned by
 22 the legislative, Executive or Judicial branches of government.

23 *18 USC §1961, Definitions*, provides, in pertinent part as follows:

24 As used in this chapter (1) "racketeering activity" means . . . (B) any act
 25 which is indictable under any of the following provisions of . . . title 18,
 26 United States Code. . . section 1341 (relating to mail fraud).

27 *18 U.S.C. §1341, Frauds and Swindles*, provides as follows:

28 Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to

1 be delivered by the person to whom it is addressed, any such matter or
 2 thing, shall be fined under this title or imprisoned not more than 20 years,
 3 or both. If the violation affects a financial institution, such person shall be
 4 fined not more than \$1,000,000 or imprisoned not more than 30 years, or
 5 both.

6 The Complaint in file herein offers the following definition of the term "UNUM."

7 Unum Life Insurance Company of America, First Unum Life Insurance
 8 Company, all subsidiaries of defendant Unum Provident Corporation (and
 9 hereinafter, collectively, along with defendant Unum Provident
 10 Corporation referred to as "UNUM,")

11 The Complaint on file herein alleges that:

12 Plaintiff is informed and believes, and thereon alleges, that the activity of
 13 the enterprise known as UNUM affected interstate commerce, in that
 14 defendants UNUM, and each of the other defendants herein, each licensed
 15 to do business in and doing business in California as well as other states,
 16 utilized insurance agents and brokers and support staff, and otherwise
 17 maintained offices in the state of California and in other states, thereby
 18 necessitating the use of highways, railways, banking, telecommunications
 19 and the U.S. Mails.

(Complaint ¶ 35)

20 Plaintiff is informed and believes, and based thereon alleges, that
 21 defendants UNUM and those DOE defendants named as Does 1-75, *supra*,
 22 engaged in a pattern of racketeering conduct by personally causing others
 23 to engage in mail and or wire fraud in violation of 18 U.S.C. section 1341,
 24 by using the United States mail to transmit fraudulent correspondence and
 25 by engaging in the pattern of wrongful, harmful and illegal acts set forth in
 26 the findings by the Insurance Commissioner of the State of California as set
 27 forth hereinabove.

(Complaint ¶ 39)

28 Plaintiff here is not seeking to vindicate merely his own contract rights as an
 employee, rather, plaintiff is seeking to vindicate the rights of himself and others, in fact all
 citizens, to live in a civil society where businesses that must, according to statute be regulated
 and licensed by the state can not, simultaneously, be run as criminal enterprises. This is an
 important right.

In passing both ERISA and RICO the United States Congress recognized the
 distinction between the rights to be vindicated under those two statutory schemes. A plaintiff
 prevailing on an ERISA claim is awarded only his contract benefits (29 USC 1132 (a)(1)(B)),
 whereas a plaintiff prevailing on a RICO cause of action may be awarded treble damages.

This distinction is important because it highlights the difference between the rights
 an ERISA plaintiff seeks to vindicate and those that a RICO plaintiff seeks to vindicate. One

1 set of rights, the ERISA rights is personal and contractual. The other, under RICO, although
 2 arising from an injury to person or property, vindicates the right of society at large to be free
 3 of racketeering activity, a much more elementary right that is, accordingly protected by more
 4 severe sanctions in the form of treble damages, *18 USC § 1964 (c)*.

5 The United States Congress passed both the ERISA and RICO statutes in providing that a
 6 prevailing party in an ERISA action be awarded only his contract benefits while a party
 7 prevailing in a RICO action be awarded treble damages, congress recognized the important
 8 distinction between the rights to be vindicated by enforcement of ERISA and RICO.

9 This court should do the same and deny defendants Motion to Dismiss because the
 10 element of identity of claims has not been met.

11 **III** 12 **ARGUMENT IN RE DEFENDANTA REQUEST FOR SANCTIONS**

13 Under rule 11 of this court, Signing of Pleadings, Motions, and Other Papers;
 14 Representations to Court; Sanctions:

15 **(a) Signature.** Every pleading, written motion, and other paper shall be
 16 signed by at least one attorney of record in the attorney's individual name,
 17 or, if the party is not represented by an attorney, shall be signed by the
 18 party. Each paper shall state the signer's address and telephone number, if
 19 any. Except when otherwise specifically provided by rule or statute,
 20 pleadings need not be verified or accompanied by affidavit. An unsigned
 21 paper shall be stricken unless omission of the signature is corrected
 22 promptly after being called to the attention of the attorney or party.

23 **(b) Representations to Court.** By presenting to the court (whether by
 24 signing, filing, submitting, or later advocating) a pleading, written motion,
 25 or other paper, an attorney or unrepresented party is certifying that to the
 26 best of the person's knowledge, information, and belief, formed after an
 27 inquiry reasonable under the circumstances,--

28 **(1)** it is not being presented for any improper purpose, such as
 to harass or to cause unnecessary delay or needless increase in
 the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are
 warranted by existing law or by a nonfrivolous argument for
 the extension, modification, or reversal of existing law or the
 establishment of new law;

(3) the allegations and other factual contentions have
 evidentiary support or, if specifically so identified, are likely
 to have evidentiary support after a reasonable opportunity for
 further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction **upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.**

(Emphasis added.)

Among the “conditions” referred to in Rule 11(c), *supra*, are the following:

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Defendants have made a motion for sanctions, in the form of attorney's fees, appurtenant to their Motion to Dismiss.

As an initial matter, it is to be noted that plaintiff herein is, and at all times pertinent hereto has been, represented by counsel. Accordingly then, under Rule 11, it is **plaintiff's counsel**, present writer, who has made the above specified representations to this court and who is solely responsible for such representations. Any sanctions imposed by the court in this matter should be imposed solely and specifically against **plaintiff's counsel** and not against plaintiff himself, who is, in any case, by the bad acts of these present defendants, reduced to living on social security in government subsidized housing . Plaintiff has never represented himself in this action,

Further, plaintiff is an individual who suffers from a brain injury, is unable to manage his own legal affairs and is represented in this matter by a guardian ad litem, his only son, Christian.

Further still, before ever instituting the present action, plaintiff and his son did retain this present writer for the sole purpose of determining whether there might exist a viable cause of action able to support a lawsuit. (SSDec InRe: Sanctions ¶¶ 4-8)

